84-1273

No. _____

Office-Supreme Court, U.S.
FILED
JAN 29 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1984

REGENTS OF THE UNIVERSITY OF MICHIGAN,

Petitioner,

v.

SCOTT E. EWING,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETER A. DAVIS
[Counsel of Record]
320 North Main Street
Ann Arbor, Michigan 48104
(313) 995-0066

Counsel for Petitioner

Of Counsel:

RODERICK K. DAANE
General Counsel
The University of Michigan
4020 Administration Building
Ann Arbor, Michigan 48109
(313) 764-0304

January 29, 1985

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

## QUESTIONS PRESENTED

I. DOES THE ELEVENTH AMENDMENT, AS CONSTRUED BY A LINE OF DECISIONS CULMINATING IN THIS COURT'S DECISION IN *PENNHURST STATE SCHOOL AND HOSPITAL* v. *HALDERMAN*, BAR THE FEDERAL COURTS FROM ORDERING STATE UNIVERSITIES (AND NOT THE INDIVIDUAL OFFICIALS THEREOF) TO COMPLY WITH DISPUTED, UNWRITTEN STATE UNIVERSITY RULES?

II. UNDER THIS COURT'S DECISION IN *BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI* v. *HOROWITZ*, MAY A STATE MEDICAL SCHOOL'S PROCEDURALLY CORRECT DISMISSAL OF AN ACADEMICALLY DEFICIENT STUDENT BE SUBJECTED TO SUBSTANTIVE DUE PROCESS REVIEW AND REVERSAL BY THE FEDERAL COURTS WITHOUT ANY REGARD FOR THE FACULTY'S SPECIAL EXPERTISE?

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | 1 |
| TABLE OF AUTHORITIES | v |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| **STATEMENT OF THE CASE** | |
| I. Nature Of The Case | 3 |
| II. Statement Of Relevant Facts | 3 |
| A. *The Medical School's Programs And Procedures* | 3 |
| B. *Respondent's Academic Problems* | 5 |
| C. *The NBME Part I Examination* | 6 |
| D. *The Inteflex Promotion Board's Decision To Drop Respondent And Respondent's Appeals Of That Decision* | 7 |
| III. Proceedings Below | 9 |
| **REASONS FOR GRANTING THE WRIT** | |
| I. The Sixth Circuit's Injunctive Order Is Against The State of Michigan Itself, Is Barred By The Eleventh Amendment, And Directly Conflicts With This Court's Decision In *Pennhurst State School and Hospital* v. *Halderman* | 10 |

Page

II. The Decision Below Raises Significant And Recurring Questions Concerning Issues Left Open By This Court's Decision In *Board Of Curators Of The University Of Missouri* v. *Horowitz* And Cannot Be Reconciled With The Diverse And Growing Progeny Of That Decision.. 15

CONCLUSION ..... 23

APPENDIX (OPINIONS AND JUDGMENTS BELOW)

A. Final Judgment, United States District Court for the Eastern District of Michigan, Southern Division (December 4, 1984) ..... 1a

B. Memorandum Opinion, United States District Court for the Eastern District of Michigan, Southern Division (December 15, 1982) [*Ewing* v. *Board of Regents of The University of Michigan*, 552 F. Supp. 881 (E.D. Mich. 1982)]..... 4a

C. Opinion, United States District Court for the Eastern District of Michigan, Southern Division (March 22, 1983) [*Ewing* v. *Board of Regents Of The University of Michigan*, 559 F. Supp. 791 (E. D. Mich. 1983)] ..... 12a

D. Opinion, United States Court of Appeals for the Sixth Circuit (September 6, 1984) [*Ewing* v. *Board of Regents of The University of Michigan*, 742 F.2d 913 (6th Cir. 1984)] ..... 28a

E. Judgment, United States Court of Appeals for the Sixth Circuit (September 6, 1984) ..... 34a

F. Order Denying Petition for Rehearing *En Banc*, United States Court of Appeals for the Sixth Circuit (October 31, 1984) ..... 35a



## TABLE OF AUTHORITIES

Cases: Page

*Alabama* v. *Pugh*, 438 U.S. 781 (1978) ..... 12

*Attorney General* v. *Regents of the University*, 30 Mich. 473 (1874) ..... 12

*Aubuchon* v. *Olson*, 467 F.Supp. 568 (E.D.Mo. 1979) .... 16

*Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978) ..... 15, 16, 17, 18, 19, 20, 21, 22

*Board of Regents of the University of Michigan* v. *Auditor General*, 167 Mich. 444 (1911) ..... 10

*Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458 (1981) ..... 18

*Connelly* v. *University of Vermont*, 244 F.Supp. 156 (D.Vt. 1965) ..... 17

*Cory* v. *White*, 457 U.S. 85 (1982) ..... 11

*DeMarco* v. *United States*, 415 U.S. 449 (1974) ..... 19

*Edelman* v. *Jordan*, 415 U.S. 651 (1974) ..... 11

*Ex Parte Young*, 209 U.S. 123 (1908) ..... 11

*Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U.S. 459 (1945) ..... 11

*Gaspar* v. *Bruton*, 513 F.2d 843 (10th Cir. 1975) ..... 17, 18

*Hall* v. *Medical College of Ohio at Toledo*, 741 F.2d 299 (6th Cir. 1984) ..... 12

*Hines* v. *Rinker*, 667 F.2d 699 (8th Cir. 1981) .... 16, 17, 21

*Hubbard* v. *John Tyler Community College*, 455 F. Supp. 753 (E.D. Va. 1978) ..... 16

*Lavash* v. *Kountze*, 473 F.Supp. 868 (D.Mass.), aff'd 604 F.2d 103 (1st Cir. 1979) ..... 16

**Cases:** Page

*Maitland* v. *Wayne State University*, 76 Mich. App. 631 (1977) ..... 13

*Pennhurst State School and Hospital* v. *Halderman*, ___ U.S. ___, 104 S.Ct. 900 (1984) ..... 10, 11, 12

*People* v. *Phippen*, 70 Mich. 6 (1888) ..... 12

*People* v. *Regents of the University*, 18 Mich. 468 (1869) . 12

*People Ex Rel. Drake* v. *Regents of the University of Michigan*, 4 Mich. 98 (1856) ..... 12

*Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982) ..... 20

*Quern* v. *Jordan*, 440 U.S. 332 (1979) ..... 12

*Regents of the University of Michigan* v. *State*, 395 Mich. 52 (1975) ..... 10

*Sterling* v. *Regents of University of Michigan*, 110 Mich. 369 (1896) ..... 10

*Stevens* v. *Hunt*, 646 F.2d 1168 (6th Cir. 1981) .... 16, 20

*Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957) ..... 16

*Watson* v. *University of South Alabama College of Medicine*, 463 F.Supp. 720 (S.D.Ala. 1979) .... 16, 17, 21

*Williams* v. *Howard University*, 528 F.2d 658 (D.C. Cir.) *cert. denied* 429 U.S. 850 (1976) ..... 18



Page

**Constitutional Provisions**

Eleventh Amendment, United States Constitution .. 2, 10, 11

Fourteenth Amendment, United States Constitution .... 2

Michigan Constitution, Art. 8, § 5 ..... 3, 10

**Statutes and Rules**

42 U.S.C. § 1983 ..... 2, 3, 9, 15

28 U.S.C. § 1254(1) ..... 1

Fed.R.Civ.P. 52(a) ..... 20

**Textbooks and Other Authorities**

R. Cecil, *Textbook of Medicine* at xxxvii (J. Wyngaarden & L. Smith 16th ed. 1982) ..... 13

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1984

---

No. _____

---

REGENTS OF THE UNIVERSITY OF MICHIGAN,

Petitioner,

v.

SCOTT E. EWING,

Respondent.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

Petitioner Regents of the University of Michigan respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 6, 1984.

## OPINIONS BELOW

The opinion of the Court of Appeals, reported as *Ewing* v. *Board of Regents of the University of Michigan*, 742 F.2d 913 (6th Cir. 1984), appears in the Appendix hereto along with the separate judgment of that court. The opinions of the Distict Court for the Eastern District of Michigan, bearing the same caption, are reported at 552 F.Supp. 881 (E.D. Mich. 1982) and 559 F.Supp. 791 (E.D. Mich. 1983), and also are included in the Appendix. The district court's 1982 opinion was not appealed and only its 1983 opinion was appealed to and reversed by the Sixth Circuit. The final judgment of the district court, entered pursuant to the opinion of the Sixth Circuit, is included at the front of the Appendix.

## JURISDICTION

The judgment and opinion of the Court of Appeals for the Sixth Circuit were entered on September 6, 1984. A timely petition for rehearing *en banc* was denied on October 31, 1984, and a copy of such order is also included in the Appendix. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the Constitution of the United States provides in part:

> • • • nor shall any State deprive any person of life, liberty, or property, without due process of law • • •.

Section 1983 of Title 42 of the United States Code provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. • • •



Section 5 of Article 8 of the Constitution of the State of Michigan provides in part:

> The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan • • • .

## STATEMENT OF THE CASE

### I. NATURE OF THE CASE

Respondent, a former special program medical student, was dismissed from petitioner University of Michigan's Medical School for multiple academic deficiencies after failing the National Board of Medical Examiners ("NBME") Part I examination while on academic warning. Following three faculty review hearings at which his dismissal was unanimously affirmed on the basis of his entire academic record, he brought suit in the United States District Court for the Eastern District of Michigan, claiming violation of his right to substantive due process under 42 U.S.C. § 1983, breach of contract, and promissory estoppel. A trial in that court resulted in a decision against respondent and in favor of petitioner on all grounds. The Sixth Circuit reversed solely on the § 1983 claim and directed the district court to enter an order compelling the University to (a) allow respondent to retake the comprehensive NBME Part I examination, and (b) reinstate him if he passes the examination.

### II. STATEMENT OF RELEVANT FACTS

#### A. The Medical School's Programs And Procedures

The Medical School of the University of Michigan has established several programs by which a student may obtain the M.D. degree.[1] Respondent matriculated in the fall of 1975 as

---

[1] These programs are: a standard four-year program designed for students who have already obtained a baccalaureate degree; a six-year integrated pre-medical/medical program known as the Inteflex program

a member of the fourth class of students to enter the Inteflex program, a rigorous and highly specialized sequence of courses designed for and open only to recent high school graduates enrolling in college for the first time.[2] DX 35-40. His progress and performance in this program were carefully reviewed at intervals by the program's faculty board.

The Inteflex Promotion and Review Board is a committee of approximately fifteen Inteflex faculty and course directors empowered to review and pass upon the qualifications of the Inteflex students. Separate faculty boards pass upon the qualifications of students enrolled in the Medical School's other programs. The applicable Medical School bulletin stated that the faculty boards:

> can, at their discretion, approve advancement, require the student to repeat all or part of a year's work, refuse further registration, or take whatever action they may deem appropriate in an individual instance. [DX 36, p. 34.]

All faculty boards deal with their respective students on an individual basis without regard to the situation of any other

---

(now a seven-year program); and a seven-year combined M.D./Ph.D. program. At the time of respondent's enrollment, the various Medical School programs maintained separate admission, curricula, review and promotion requirements and procedures. With one exception, the Inteflex students did not take any of their courses with students from the other programs. Tr. I, p. 125; DX 35-40. [Note: record references (Tr. I, II or III, PX, DX, etc.) are to volumes I, II or III of the trial transcript, plaintiff's trial exhibits and defendant's trial exhibits.]

[2] The Inteflex Program was divided into three two-year phases. Phase I consisted predominantly of required and elective college-level science and humanities courses. Phase II encompassed the basic medical science courses, but continued to allow some college level courses as in Phase I. Phase III consisted of required and elective clerkships in a hospital setting in which Inteflex and standard students were totally intermingled for the first time. Tr. I, pp. 146-147.



student. Tr. III, p. 281. The boards examine and discuss the total performance of the student as well as isolated instances of failure. Tr. III, p. 196. Faculty review boards may be petitioned to reconsider their decisions and any adverse decision may be appealed to the Medical School's Executive Committee. Tr. I, p. 63-64; DX 36, p. 34.

### B. Respondent's Academic Problems

Respondent's performance in the Inteflex program prior to his dismissal was characterized by repeated shortcomings, academic deficiencies, and irregular progress.[3] During his first year of study, he satisfied only one-fourth of his course work in the regular manner. He required six calendar years to complete the course work normally accomplished in four years; manipulating his schedule and reducing his course loads through incompletes and two leaves of absence. He received psychiatric counseling on several occasions. The biomedical science courses which formed the backbone of the curriculum posed special problems for him. He received incompletes in seven courses, withdrew from another, and failed yet another course, which he was thereafter required to repeat. His failing scores on some course exams were the lowest ever recorded. He often beguiled his professors into allowing him to postpone or retake examinations or to ignore certain of his low mid-semester scores so as to raise his overall course grade average. Three times he was placed on academic probation and warned that any further deficiencies could lead to his dismissal.[4] Indeed, he failed the comprehensive NBME Part I examination while on academic probation.

---

[3] The district court carefully detailed respondent's academic progress in its opinion below. Appendix C at 12a-20a; 559 F.Supp. at 793-796.

[4] Every warning letter invited respondent to come into the Dean's office to discuss his academic problems. DX 17, 18 and 19. Respondent never accepted any of these invitations. Tr. III, p. 36-40.

### C. The NBME Part I Examination

In June of 1981 respondent sat for Part I of the standardized comprehensive examination promulgated by the National Board of Medical Examiners (the "NBME Part I"). Official bulletins of the Medical School clearly described successful performance on the NBME Part I as a formal requirement both for promotion to the clinical stage of the student's medical education (Phase III for Inteflex students) and for graduation. DX 35-38. Successful performance on the NBME Part I is also a requirement for state licensure.[5] Tr. I, p. 192. All medical students are required to take this examination, Tr. I, p. 148, and failure is treated as a formal deficiency by all faculty review boards. Tr. II, p. 67; Tr. III, p. 248.

The NBME Part I is a two-day multiple choice examination in the basic medical sciences and includes questions on anatomy, behavioral sciences, biochemistry, microbiology, pathology, pharmacology, and physiology. It is designed to test the student's overall knowledge of science disciplines which are regarded as basic to the practice of medicine and a passing score is essential before a student is allowed to proceed from the academic to the clinical phase of his or her medical education. Tr. I, p. 28-30, 147-148. Having remediated[6] the deficiencies in all of his courses, Tr. I, p. 174-175; Tr. II, p. 104, respondent was considered qualified to sit for the NBME Part

---

[5] The NBME Part I scores are analyzed on a national mean of 500. Tr. I, p. 190-191. At the time respondent sat for the NBME Part I, the Medical School faculty required a score of 345 for promotion and graduation; the national standard of 380 was required for state licensure. Tr. I, p. 191-192. As of this writing, a score of 380, the national standard, is now required for all purposes. Tr. I, p. 191.

[6] Remediation of those deficiencies meant only that respondent had been allowed to progress through the program, and *not* that all evidence of his previous deficiencies was removed from the faculty review board's consideration of his qualifications to continue in his studies. Tr. I, p. 175; Tr. III, p. 270.



I. Tr. II, p. 104-105; Tr. III, p. 147-148. He was, however, still subject to the faculty board's requirement that he complete Phase II of the Inteflex program in the prescribed fashion and without additional deficiency in order to remain in registration and be promoted. Tr. II, p. 64; DX 18 and 19.

Respondent failed five of the seven subjects and had a total score of only 235 on the NBME Part I examination, well below the cut-off score of 345 then required for passing. DX 9, 10, and 14. His score of 235 was not only the lowest score in his class, but was found by the trial court to be the lowest score ever recorded by a University of Michigan medical student on Part I of the exam. Appendix C at 15a; 559 F.Supp. at 794. Respondent's failure of the NBME Part I constituted a formal deficiency on his record, Tr. III, p. 248, and thus a failure to complete Phase II as prescribed by the board. Tr. II, p. 64-65. As such, he was subject to dismissal. Tr. III, p. 248; DX 18 and 19.

### D. The Inteflex Promotion Board's Decision To Drop Respondent And Respondent's Appeals Of That Decision

As was the normal practice in every other instance where a student failed the NBME Part I, respondent's deficient performance on that examination caused him to be brought before the Inteflex faculty board. The board met on July 24, 1981, reviewed respondent's entire academic history, considered the fact that he had been required to complete Phase II without further deficiency, and thereafter voted unanimously that respondent was no longer qualified to continue and should be dropped from the program. DX 9. The faculty board thus believed that respondent's abysmal failure on the NBME Part I merely culminated a long series of unsatisfactory academic performances; it was "the straw that broke the camel's back." Tr. III, p. 277.

As was his right, respondent petitioned the board in writing to reconsider its decision to drop him from registration. DX 21. On July 31, 1981, the board reconvened in special session with seventeen Medical School professors in attendance, and respondent was allowed to appear and present evidence in support of his request. DX 10. Respondent proceeded to outline a series of reasons to explain his poor performance and warrant a retest, reciting a recent romantic disappointment and his diminished preparation time due to his need to make up a previous course deficiency. Tr. III, p. 64-66; DX 10. He also attempted to explain all of his previous course deficiencies and lessen their severity by pointing to an extracurricular literary prize he had received and the honors he had been given in one of his clinical courses as evidence of his ability to perform. DX 10. Several of the board members then asked respondent questions. Tr. III, p. 62-64; DX 10. Respondent agreed that he had exhibited a pattern of inadequate performance, explained that it might have been due to a lack of maturity, but stressed that these tendencies were now behind him. DX 10. In his written petition, he also admitted that he may have overextended himself with extracurricular activities. Tr. III, p. 109; DX 21. He further admitted that he had been fully aware of the meaning of the warning letters he had received, and was "under the gun" when he took the NBME because he knew that if he failed he could be dropped from registration. Tr. III, p. 273; DX 10. The board, after considering his explanations, unanimously voted to affirm its earlier decision. DX 10.

On August 27, 1981, respondent appealed the faculty board's decision to the Medical School's six-member Executive Committee. Tr. III, p. 154; DX 49. He appeared and presented essentially the same reasons as before to explain his failure. The executive committee voted unanimously to affirm the board's decision.

Respondent again appeared before the executive committee on June 17, 1982, and yet a third time on July 29, 1982. DX



50 and 51. He asked to be readmitted to the Medical School, and was allowed to present documentary and testimonial evidence to the committee members. The executive committee on both occasions unanimously voted to affirm respondent's dismissal.

## III. PROCEEDINGS BELOW

On July 19, 1982, respondent filed a four-count complaint in the district court seeking both damages and equitable relief. His claim for damages was dismissed prior to trial and was not appealed. Appendix B at 4a; 552 F.Supp. 881. Respondent's equitable claim, which sought an injunction to require the board to allow him to retake the NBME Part I and, if he passed, to reinstate him in the Inteflex Program, was premised on three separate grounds: (1) the violation under color of state law of his right to substantive due process, actionable under 42 U.S.C. § 1983; (2) breach of contract; and (3) promissory estoppel. A non-jury trial was held over four days in January of 1983, during which eight professors testified, and an opinion was filed on March 22, 1983, denying each of respondent's claims. Appendix C at 12a; 559 F.Supp. 791.

On appeal, the Sixth Circuit reversed the district court solely on the basis of respondent's § 1983 claim by focusing exclusively on his contention that he was the only one of 40 University of Michigan medical students who failed the NBME Part I on the first examination and was dismissed for that single failure. Appendix D at 28a; 742 F.2d 913. In so doing it concluded, contrary to the district court, that by failing to follow its "consistent practice" the Medical School necessarily treated respondent in an arbitrary and capricious manner. On the basis of this finding, the Sixth Circuit ordered the relief sought by respondent.

## REASONS FOR GRANTING THE WRIT

### I. THE SIXTH CIRCUIT'S INJUNCTIVE ORDER IS AGAINST THE STATE OF MICHIGAN ITSELF, IS BARRED BY THE ELEVENTH AMENDMENT, AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *PENNHURST STATE SCHOOL AND HOSPITAL* v. *HALDERMAN*

In both his original and amended complaint, respondent named petitioner "Board of Regents of the University of Michigan" as the only defendant, sought relief against the Board as an entity, and did not name or seek relief against the individual Regents as defendants. Petitioner University was created by the Michigan Constitution[7] and is recognized by the highest court of that state as a fourth branch of state government.[8] Petitioner raised the bar of the eleventh amendment as an affirmative defense and, on motion, the district court dismissed respondent's damage claim, holding on the basis of settled law that petitioner was "a state instrumentality within the meaning of the Eleventh Amendment." Appendix B at 8a; 552 F.Supp. at 884.

In ordering petitioner to allow respondent an examination retest and to then reinstate him in its Medical School if he passes, the Sixth Circuit reversed the district court's fact finding that petitioner had no rule allowing all students two chances at passing the NBME Part I examination. In so order-

[7] "The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan • • • ." Michigan Constitution, Art. 8, § 5.

[8] *Regents of the University of Michigan* v. *State*, 395 Mich. 52, 74, 235 N.W.2d 1, 11 (1975); *Board of Regents of the University of Michigan* v. *Auditor General*, 167 Mich. 444, 450, 132 N.W. 1037, 1040 (1911); and *Sterling* v. *Regents of University of Michigan*, 110 Mich. 369, 377-378, 68 N.W. 253, 255-256 (1896).



ing, the Sixth Circuit necessarily found that the University of Michigan had established a rule (or "consistent practice") which it ignored in dismissing respondent, and the Sixth Circuit's order, plainly and simply, constitutes an unlawful federal court order enjoining the State of Michigan to comply with a disputed state rule.

The eleventh amendment prohibits the federal judiciary from exercising such equitable powers in this suit brought by a California citizen against the State of Michigan. "[W]hen the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." *Pennhurst State School and Hospital* v. *Halderman*, — U.S. —, 104 S.Ct. 900, 909 (1984).[9] Apart from the fact that the Regents of the University of Michigan, whether acting individually or officially as a group, are powerless to order the faculty of the Medical School to determine what subjects to teach or what individual students to admit, pass, or fail, and even in the absence of a state rule, the Regents of the University of Michigan cannot be ordered by the federal courts in this case to grant *any* relief to the California respondent at bar because "the State is the real substantial party in interest • • •." *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945). *See also Cory* v. *White*, 457 U.S. 85 (1982). The narrow exception of *Ex Parte Young*, 209 U.S. 123 (1908), does not apply because respondent's action was brought against "a body corporate" and not against individual state officials. *Edelman* v. *Jordan*, 415 U.S. 651, *reh'g denied* 416 U.S. 1000

[9] *Pennhurst* was decided long after the district court's second decision following trial in this case, and petitioner, having won at trial, did not argue either the eleventh amendment or *Pennhurst* in its initial brief before the Sixth Circuit. However, the eleventh amendment and *Pennhurst* were raised in the Regents' petition for rehearing *en banc* and, in any event, the bar of the eleventh amendment "may be raised at any point in a proceeding", including on appeal. *Pennhurst, supra*, at 907, n.8.

(1974). *See also Quern* v. *Jordan*, 440 U.S. 332 (1979); *Alabama* v. *Pugh*, 438 U.S. 781 (1978); *Hall* v. *Medical College of Ohio at Toledo*, 741 F.2d 299 (6th Cir. 1984).

In *Pennhurst*, this Court observed that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." 104 S.Ct. at 911. In harkening to respondent's talismanic recitation of a "second chance" rule, and in blindly accepting respondent's seductively misleading statistics, the Sixth Circuit has brought into sharp focus the reason for this Court's warning in *Pennhurst*. In implicitly reserving matters of eduction to the several states, our Constitution has permitted medical school education in this country to flourish with the development of large medical centers, such as that at the University of Michigan in Ann Arbor, of premier excellence. Even the Supreme Court of Michigan, in opinions which have withstood the test of time, has refused to interfere with the faculty of the Medical School in establishing its curriculum, selecting its faculty and students, and in passing upon the qualifications of its students.[10]

More than law school,[11] medical school education is designed to rigorously train students to perform decisively and correctly and to make rapid life-saving decisions, even in a crisis atmosphere. For this reason the courses and tests during the curriculum are so arranged and structured as to train medical students for later patient care. Thus, the comprehen-

[10] *People Ex Rel. Drake* v. *Regents of the University of Michigan*, 4 Mich. 98 (1856) (mandamus to appoint homeopathic professor denied); *People* v. *Regents of the University*, 18 Mich. 468 (1869) (state statute requiring appointment of professor of homeopathy unconstitutional); and *Attorney General* v. *Regents of the University*, 30 Mich 473 (1974) (application to require appointment of two professors of homeopathy declined).

[11] On this point see especially *People* v. *Phippen*, 70 Mich. 6, 19-20, 37 N.W. 888, 895 (1888).



sive NBME Part I examination is administered by the faculty of the Medical School immediately after the academic phase and before the clinical phase of a student's education in order to timely test the medical student's fund of knowledge essential to treat human illnesses. In 1981 a score of 345 was required to pass. Respondent earned a score of 235, which the district court found to be the lowest score ever recorded in this history of the Medical School. Appendix C at 15a; 559 F. Supp. at 794. Only the most sanguine educator would expect respondent to pass the examination a second time if he were required to take it under normal conditions, in the midst of a stressful curriculum, competing against fellow students. Yet, the Sixth Circuit's order allows respondent to take the examination after studying for it at his leisure, on his own terms, and on his own time,[12] thus defeating the whole purpose of testing in the medical school curriculum.[13]

The Sixth Circuit's order constitutes education by demoralizing injunction and demonstrates in two other ways why federal courts should not venture into state academic thickets. First, it exceeds even what Michigan's state courts could have ordered had respondent's identical action been brought in those courts, *Maitland* v. *Wayne State University*, 76 Mich.

[12] The district court's final judgment of December 4, 1984, included as Appendix A hereto, was entered pursuant to the Sixth Circuit's order and was drafted by counsel for respondent. It shows that respondent has selected September of 1986 as the date for his second sitting of the NBME Part I examination, thus giving him some five years after his failure of the examination to prepare for a retest, whereas his former classmates had just a few days to prepare for such examination. Furthermore, the final judgment states that respondent is to be graded under 1981 standards (passing score of 345), even though the Medical School's present passing score is 380 for all students.

[13] The opening essay of a leading textbook on medicine teaches that "the practice of medicine cannot be sealed off into convenient hours • • •." R. Cecil, *Textbook of Medicine* at xxxvi (J. Wyngaarden & L. Smith 16th ed. 1982).

App. 631, 639-640, 257 N.W.2d 195, 200 (1977) (state courts cannot order reinstatement, only rehearing at university level), and second, it orders petitioner to perform an academically impossible task since only students who are officially enrolled in United States or Canadian medical schools may sit for the NBME Part I examination.[14]

The lower court's order thus is a dangerous precedent that seriously threatens all medical school education in this country. Indeed, it has sounded a shock wave throughout the community of medical schools in the United States and has dispirited respondent's professors, some of whom devoted more than a hundred hours in reviewing his academic record. Tr. III, p. 275. If allowed to stand and if followed by other courts in other jurisdictions, it could require the faculties of medical schools to abandon their carefully developed and longstanding evaluative processes in favor of woodenly applied standards which could signal the end of high-quality medical school education in this country.

---

[14] The NBME examinations are administered by the National Board of Medical Examiners, an independent entity headquartered in Philadelphia and not a party to this action. The University of Michigan cannot sponsor a dismissed, non-enrolled student for the examination. See the Official Bulletins of the National Board of Medical Examiners.



## II. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING QUESTIONS CONCERNING ISSUES LEFT OPEN BY THIS COURT'S DECISION IN *BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI* v. *HOROWITZ* AND CANNOT BE RECONCILED WITH THE DIVERSE AND GROWING PROGENY OF THAT DECISION.

In *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978), this Court defined the procedural protections which a student at a state medical school may invoke pursuant to 42 U.S.C. § 1983 when subject to dismissal for academic reasons. In leaving open the question whether federal courts may review the substance of a state university's procedurally correct decision to dismiss a student for purely academic reasons, this Court cautioned:

> Courts are particularly ill-equipped to evaluate academic performance. The factors discussed in Part II [of this decision] with respect to procedural due process speak *a fortiori* here and warn against any such judicial intrusion into academic decisionmaking. [Footnote omitted. *Id.* at 92.]

It is a putative substantive due process claim which forms the heart of respondent's case herein.[15]

The quoted passage from *Horowitz* has troubled the courts of appeal and the district courts which have since had occasion

---

[15] In its decision below, the Sixth Circuit stated that "[b]ecause we believe this case can be disposed of on the Section 1983 claim, this Court does not expressly reach the [respondent's] breach of contract or promissory estoppel claims." Appendix D at 30a, n. 2; 742 F.2d at 914, n. 2. Indeed, respondent admitted from the beginning that his right to procedural due process was not violated. (Plaintiff's Amended Complaint dated November 10, 1982, and Plaintiff's Trial Brief dated January 15, 1983.)

to address substantive due process claims in the context of academic decisions. The lower courts have disagreed as to the circumstances under which a court may review such decisions. Some courts have held that this Court's admonition in *Horowitz* forecloses substantive judicial review altogether. *Lavash* v. *Kountze*, 473 F.Supp. 868 (D.Mass.), *aff'd* 604 F.2d 103 (1st Cir. 1979); *Hubbard* v. *John Tyler Community College*, 455 F.Supp. 753 (E.D.Va. 1978). Other courts have avoided the issue by finding that regardless whether such a cause of action exists, no arbitrary or capricious conduct had been demonstrated. *Hines* v. *Rinker*, 667 F.2d 699 (8th Cir. 1981); *Stevens* v. *Hunt*, 646 F.2d 1168 (6th Cir. 1981). Still other courts have suggested that such a cause of action may exist when certain facts can be demonstrated. *Aubuchon* v. *Olson*, 467 F.Supp. 568 (E.D. Mo. 1979); *Watson* v. *University of South Alabama College of Medicine*, 463 F.Supp. 720 (S.D. Ala. 1979). The Sixth Circuit alone, in the opinion below, has explicitly stated that such a cause of action does exist. Appendix D at 32a; 742 F.2d at 915.

If such a cause of action exists, which petitioner denies, public policy demands that the courts maintain their traditionally deferential approach to difficult questions of academic decisionmaking if high quality medical school education is to survive in this country. Indeed, nearly three decades ago this Court warned of the "grave harm resulting from governmental intrusion into the intellectual life of a university, • • •." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 261 (1957) (Frankfurter, J., concurring). The district court below recognized that substantive review of decisions involving academic qualifications cannot be equated with traditional notions of substantive due process review. Appendix C at 24a; 559 F.Supp. at 798. Other courts likewise have recognized that any substantive review of academic decisions should be indulged in with this deference in mind and in light of *all* the circumstances contributing to the academic decision in controversy. *Hines* v. *Rinker*, *supra*; *Stevens* v. *Hunt*, *supra*; *Watson* v. *University of South Alabama College of Medicine*, *supra*; *Connelly* v. *University of Vermont*, 244 F.Supp. 156 (D.Vt. 1965). Remarkably, the Sixth Circuit not only failed to acknowledge that these restrictions governed its analysis of respondent's claim, but that court never even addressed the numerous scholastic factors upon which the medical faculty's decision to dismiss respondent was largely based.



While *Horowitz* did not expressly detail the precise elements which would form the basis of a substantive due process action, it implied that an aggrieved party must prove, as must the plaintiff in a procedural due process action, that he was deprived of a right secured by the Constitution of the United States and that the deprivation occurred under color of state law. 435 U.S. at 91-92. Significantly, *Horowitz* also implied that, if academic dismissals also can be enjoined on substantive due process grounds, the aggrieved party must further show the dismissal to have been clearly arbitrary and capricious. *Id.* It is on the application and interpretation of this latter requirement that the decision below misinterprets the guiding principles in *Horowitz* and departs from the decisions of all other courts which have addressed the issue.

The Sixth Circuit nominally adopted the arbitrary and capricious standard articulated in its earlier decision in *Stevens* v. *Hunt*, *supra*: "'In order to establish such arbitrary and capricious action, the plaintiffs must show that there is no rational basis for the University's decision, or that the decision to dismiss was motivated by bad faith or ill will unrelated to academic performance.'" Appendix D at 32a; 742 F.2d at 915.[16] As the Sixth Circuit did not disturb the district court's

---

[16] The Eighth Circuit defined the arbitrary and capricious requirement in almost identical language in *Hines* v. *Rinker*, 667 F.2d 699, 703 (8th Cir. 1981). *Compare Gaspar* v. *Bruton*, 513 F.2d 843, 851 (10th Cir. 1975) (relief may be granted "only in those cases where the student presents positive evidence of ill will or bad motive"); and *Watson* v. *University of South Alabama College of Medicine*, 463 F. Supp. 720,

finding that petitioner's decision was not motivated by "bad faith, ill will or other impermissible ulterior motives," Appendix C at 26a; 559 F.Supp. at 799, it was required to uphold that decision if it could in any manner be grounded in reason. Indeed, on this point the Sixth Circuit's opinion is irreconcilably in conflict with a pre-*Horowitz* decision of the District of Columbia Circuit. In *Williams* v. *Howard University*, 528 F.2d 658 (D.C. Cir.), *cert. denied* 429 U.S. 850, (1976), that Circuit refused to condemn a medical school's executive committee for misapprehending the assignment of a grade of "unsatisfactory" because substantive review was not warranted, "taking into acount the nature of plaintiff's record as a whole * * *." *Id.* at 659, n. 1.

The required judicial deference to academic decisions is based on a time-proven presumption that such decisions, made by teachers who are highly educated and experienced in their specialized fields, are correct. *Gaspar* v. *Bruton*, 513 F.2d 843, 850 (10th Cir. 1975). The aggrieved student therefore must produce clear and convincing evidence to overcome this presumption if he is to prevail on his claim. That respondent was unable to make this required showing below is evident in that the trial court found in favor of petitioner. In essence, then, the Sixth Circuit's reversal amounts to a holding that respondent was entitled to a retest on the NBME, despite his egregious academic history, solely because 40 other students had been afforded such opportunity.[17] Since there was more

727 (S.D. Ala. 1979) (relief may be granted only "where there was evidence that a student with an academic record and an individual history very similar to the plaintiff's was afforded substantially different treatment").

[17] Respondent's evidence on this issue was wholly statistical. But, since "[n]o matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections; a contrary conclusion would trivialize the Constitution," *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458, 465 (1981), this single fact does not demonstrate that the faculty's action was arbitrary and capricious.



than adequate support for the trial court's finding to the contrary,[18] and since the Sixth Circuit in conducting its review was guided by the principle that "fact finding is the basic responsibility of district courts, rather than appellate courts," *DeMarco* v. *United States*, 415 U.S. 449, 450 n. (1974) (per

[18] Petitioner argued that respondent's contention was factually misleading for the following reasons:

(1) Respondent's dismissal was not solely the result of his failure on the NBME; rather, the faculty decided to dismiss him only after thoroughly reviewing his entire academic record.

(2) Respondent's figure of 40 students was derived by combining 32 Standard students with eight Inteflex students. This was improper because, as shown above, these two groups of students are different in many significant respects.

(3) In comparing respondent with the other seven Inteflex students, it is seen that he was only one of two who was on academic warning at the time he sat for the NBME Part I. The other student presented acceptable extenuating circumstances (epileptic episode during the examination) to the faculty board; respondent did not.

(4) Nineteen other Inteflex students, many of whom had records better than respondent's, were dismissed by the faculty without ever having taken the NBME Part I. Respondent could likewise have been dismissed.

(5) Student were not "routinely" given two chances to pass the NBME Part I; instead, the practice was that every student who failed the exam was brought before the appropriate faculty board, reviewed, and voted upon. The other students were allowed a retest only by independent and separate action of the faculty board.

(6) Even if respondent's factual contention that petitioner failed to follow its own rule is taken as correct, the legal conclusion he urges is erroneous. This Court has recognized that a state university's failure to follow its own rules in dismissing a student for academic reasons does not amount to a constitutional violation. *Horowitz* at 92, n. 8.

In fairness to the Sixth Circuit, it must be said that the panel's re-

curiam), and that under Fed.R.Civ.P. 52(a) a district court's factual findings may not be set aside unless clearly erroneous, *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982), its naked conclusion that the trial court's finding was "clearly erroneous", was improper.[19] Appendix D at 32a-33a; 742 F.2d at 915-916.

The net result of the Sixth Circuit's reversal below was to ground its analysis of respondent's substantive due process claim solely in contract. This contract analysis, while applicable to and correctly applied by the Sixth Circuit to respondent's demonstration that he had a property right so as to invoke the protection of § 1983 in the first instance, Appendix D at 30a-31a; 742 F.2d at 914-915, was errantly misplaced when applied to the wholly separate arbitrary and capricious component of any cause of action for violation of his substantive due process rights.[20] In resting its decision on such a

---

view of the district court's decision was based on an incomplete transcript. Respondent did not order the court reporter to prepare a transcript of the closing argument, which was almost entirely devoted to a colloquy between Chief Judge Feikens and counsel for both sides as to the meaning of this Court's decision in *Horowitz*. Petitioner pointed out the absence of this crucial transcript in its brief to the Sixth Circuit. Unfortunately, the missing 90-page transcript was not filed by the court reporter until after the Sixth Circuit's decision herein, although before that court's denial of rehearing *en banc*.

[19] The district court's finding on this issue was made in the context of respondent's contract claim. Appendix C at 26a-27a; 559 F.Supp. at 800. The Sixth Circuit's reversal of that finding, however, was made in the context of respondent's substantive due process claim. Appendix D at 32a-33a; 742 F.2d at 915-916.

[20] The contractual right which comprised respondent's property interest was found by the Sixth Circuit to be "an implied understanding that a student shall not be arbitrarily dismissed from his university." Appendix D at 31a; 742 F.2d at 915. No finding was made that respondent had a property interest in being given a second chance to take the NBME Part I examination. Thus the Sixth Circuit's finding that respondent was entitled to such a second chance was based on the faulty premise that it was a protected right, and in *Stevens* v. *Hunt*, 646 F.2d



narrow ground, the Sixth Circuit failed to consider other factors which *Horowitz* implied were relevant to a proper assessment of the arbitrary and capricious component of respondent's cause of action. First, it ignored the totality of the circumstances essential to the faculty's decision to dismiss respondent. Second, it shunned the court's traditional deferential attitude toward academic decision-making.

In contrast, the Eighth Circuit, in *Hines* v. *Rinker*, 667 F.2d 699 (8th Cir. 1981), held that "[r]espect for the discretion of those best qualified to make such judgments dictates that the Medical School and not the federal courts should determine the qualifications of [a student] to continue his medical studies." *Id.* at 704. The medical student in *Hines* had argued that a failing course grade was the result of his reliance on a written course outline which purportedly allowed any student to receive an incomplete grade and subsequently make up the deficiency. The court rejected his narrow contention that such dismissal was arbitrary and capricious; the entire Medical School faculty had reviewed his grade and overall scholastically deficient academic record and agreed that his dismissal should not be overturned. Under the totality of the circumstances, the Eighth Circuit thought it proper to defer to the judgment of the faculty as to the student's overall qualifications to continue in his studies. *Ibid.*

The district court in *Watson*, *supra*, by requiring the plaintiff medical student to make a "clear and convincing showing" that his dismissal was arbitrary and capricious, *Id.* at 727, also recognized that deference to the university's academic decision was mandated. The student in *Watson*, like respondent here, based his claim on the school's Student Promotion and Evaluation Committee's record with respect to other students. The court rejected the student's claim that the different treatment

---

1168, 1170 (6th Cir. 1981), another panel of the Sixth Circuit found, under comparable Tennessee law, that there was *no* property right in a medical student's expectation of a retest on the NBME examination.

received by those other students necessarily rendered the individual treatment he received arbitrary and capricious, since it was to be expected that the committee, in separately considering the entire academic records of the many different students, would afford those students separate and individual treatment. Since the plaintiff was unable to demonstrate that *any* other student in his situation under all the circumstances had received different treatment, the court held that his dismissal could not be said to be arbitrary and capricious.

In finding respondent at bar "qualified" before he took the NBME Part I, the Sixth Circuit wrongly assumed he was still qualified *after* he failed the examination and went on to regard him as a student *qualified* for a retest. Appendix D at 33a; 742 F.2d at 916. In reaching this conclusion, the Sixth Circuit began with a faulty premise and used it to construct a simplistic and inherently erroneous syllogism which it then substituted for the painstaking judgment of petitioner's medical faculty as to respondent's qualifications to continue in his studies. In so doing, it did not even allude to the unanimous decisions of those best trained and qualified to assess respondent's qualifications, or to the numerous academic factors on which their decision to dismiss him was based. By so myopically reviewing the petitioner's decision not to allow respondent a retest, the Sixth Circuit failed to heed this Court's repeated warnings against intruding into academic affairs.

These conflicts, with the guidance offered by this Court's decision in *Horowitz* and with other courts' interpretation of that decision, justify the grant of certiorari to review the correctness of the decision below.



## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

/s/ PETER A. DAVIS
PETER A. DAVIS
320 N. Main Street, Suite 400
Ann Arbor, Michigan 48104
(313) 995-0066

Counsel for Petitioner

January 29, 1985

## APPENDIX A

---

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
ANN ARBOR

---

No. 82-60271

---

SCOTT E. EWING,

Plaintiff,

v.

BOARD OF REGENTS OF THE
UNIVERSITY OF MICHIGAN,

Defendant.

---

Hon. John Feikens, Chief Judge

---

## FINAL JUDGMENT

[Entered on December 4, 1984, pursuant to Opinion of the Sixth Circuit dated September 6, 1984]

---

This cause having come on by the mandate of the Court of Appeals for the Sixth Circuit issued on November 8, 1984 in *Ewing* v. *Board of Regents*, No. 83-1333, reported at 742 F.2d 913 (6th Cir. 1984), and plaintiff Scott E. Ewing having filed a motion for entry of a judgment order pursuant to the mandate and an application for an award of reasonable attorneys' fees and costs, and the parties having agreed as to the amount of such award,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT a final judgment be entered in favor of plaintiff Scott E. Ewing ("Ewing") and against defendant Regents of the University of Michigan (the "Regents") ordering the Regents to permit and sponsor Ewing to take the National Board of Medical Examiners (NBME) Part I examination, pursuant to the same terms and standards applicable to him in June 1981, at the regularly-scheduled session to be held in the month of September, 1986.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT, should Ewing on this basis achieve a passing score on the NBME Part I examination, the Regents reinstate Ewing in the Inteflex Program on the same basis as if he had passed the NBME Part I on the first occasion in June, 1981.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT Ewing, pursuant to 42 U.S.C. § 1988, is entitled to an award of reasonable attorneys' fees, disbursements and expenses to be paid by the Regents in the amount of $63,001.47 and therefore, judgment is entered in favor of Ewing and against the Regents for such attorneys fees, disbursements and expenses in the amount of $63,001.47, and that payment of such amount by the Regents is stayed until final disposition in the Supreme Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT this order shall not prevent the Regents from seeking Supreme Court review of the Sixth Circuit's opinion and orders or applying to this Court to extend the NBME examination date beyond September 1986, if the Supreme Court has accepted review of this case and has not rendered a decision by that date.

Enter: JOHN FEIKENS
U.S. District Judge



Agreed As To Form Only:

/s/ PETER A. DAVIS
DAVIS & FAJEN, P.C.
320 North Main Street
Suite 400
Ann Arbor, Michigan 48104

Attorney for Defendant

/s/ MICHAEL M. CONWAY
HOPKINS & SUTTER
Three First National Plaza
Suite 4100
Chicago, Illinois 60602

Attorney for Plaintiff

## APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 82-60271

SCOTT E. EWING,

Plaintiff,

v.

BOARD OF REGENTS OF THE
UNIVERSITY OF MICHIGAN,

Defendant.

## MEMORANDUM OPINION

[Entered December 15, 1982, and reported at
552 F. Supp. 881 (E. D. Mich. 1982)]

Scott Ewing ("Ewing") challenges his dismissal from the University of Michigan Medical School. In his complaint, Ewing alleges that he was wrongfully dismissed in violation of his constitutional and contractual rights. He is seeking both injunctive relief and damages from the University of Michigan's Board of Regents ("the Board").

Defendant has moved to dismiss Count III of Ewing's complaint, which asks for monetary damages pursuant to 42 U.S.C. § 1983.[1] It urges: that the Board is immune from suit for

[1] Five other motions were pending in this case when defendant's motion to dismiss was heard. Defendant's motions were: to compel separate numbering of paragraphs in the complaint; for a more definite statement; and to strike. Plaintiff's motions were: for a preliminary injunction; and to overrule defendant's objections to interrogatories and document requests. At the hearing, it was agreed by the parties that plaintiff would redraft his complaint to respond to defendant's three motions just mentioned, and that the trial date for this case would be advanced so as to obviate the necessity of hearing plaintiff's motion for a preliminary injunction. It was also agreed that a stipluation would be entered with respect to the interrogatories and document requests found objectionable by defendant. Therefore, no further discussion on these motions is necessary.



monetary damages because of the Eleventh Amendment to the Constitution; and that the Board is not a "person" within the meaning of 42 U.S.C. § 1983. With regard to Eleventh Amendment immunity, Ewing counters that the Board is not a sovereign state entity within the meaning of the Eleventh Amendment, or, alternatively, that the Board has waived any Eleventh Amendment immunity it might have had. Ewing also maintains the Board is a "person" under § 1983. For the reasons stated herein, I grant defendant's motion to dismiss Count III of the complaint.

### I.

In the absence of waiver, the Eleventh Amendment protects states from money judgments. *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945).

The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Judicial interpretations have held the Amendment applicable to suits brought by a citizen against his own state. *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1973); *Hans* v. *Louisiana*, 134 U.S. 1 (1890). The Amendment has also been interpreted to

protect state instrumentalities and agencies from suit. *Edelman* v. *Jordan, supra; City of Detroit, et al.* v. *State of Michigan*, 543 F.Supp. 220 (E.D. Mich. 1982). Thus, if the University of Michigan is a state agency or instrumentality, it is entitled to claim immunity with respect to Count III of Ewing's complaint, provided it has not waived its right to do so.[2]

Whether a university is a state instrumentality under the Eleventh Amendment must be determined by considering the particular characteristics of the institution in question. *Long* v. *Richardson*, 525 F.2d 74 (6th Cir. 1975); *Soni* v. *Board of Trustees of University of Tennessee*, 513 F.2d 347 (6th Cir. 1975).[3] State court decisions may be given considerable weight in making this determination. *Long* v. *Richardson, supra*. Although the United States Court of Appeals for the Sixth Circuit has not yet ruled with respect to the University of Michigan, two judges of this District,[4] relying in part upon

---

[2] If the University were merely a local governmental body, rather than a part of the state, then it would not be entitled to Eleventh Amendment immunity. *Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 690 n. 54 (1978).

[3] In *Patsy* v. *Board of Regents of the University of Florida*, 50 U.S.L.W. 4731 (June 22, 1982), the Supreme Court noted that the question of Eleventh Amendment immunity involved interpreting state law and resolving state questions of fact. Ewing argues that because the Supreme Court has acknowledged the place of factual determination in deciding an Eleventh Amendment immunity question, I cannot dismiss Count III of his complaint without further fact finding. I disagree. Michigan's constitutional, statutory and case law provide me with all the information I need to decide the initial question of whether the University is a state instrumentality. With respect to waiver, discussed *infra*, Ewing has not suggested any facts which might alter my judgment on that issue.

[4] Judge Pratt so held in *Marwil* v. *Board of Regents, et al.*, Civil Action No. 79-73331 (E.D. Mich., July 3, 1980); Judge Guy has reached the same opinion in two cases: *Reiner* v. *Bidlack, et al.*, Civil Action No. 74-72922 (E.D. Mich., September 13, 1978); *Casad* v. *Regents of the University of Michigan*, Civil Action No. 80-74793 (E.D. Mich., July 30, 1982).



Michigan case authority, have held that the University is a state instrumentality entitled to Eleventh Amendment immunity. I agree with their conclusions.

The Board of Regents is at least colorably a state instrumentality by virtue of its constitutional mandate to supervise the University and manage its funds. Mich. Const. Art. 8 § 5. Although granted much independence in how it conducts university affairs, the Board is still subject to state audit, and must hold its formal meetings publicly. Mich. Const. Art. 8 § 4. The eight members of the Board are publicly elected officials. Art. 8 § 5. In analyzing the nature of the Board, Michigan courts have routinely held that it is "a department of the State government created by the Constitution to perform State functions." *Attorney General* v. *Burhans*, 304 Mich. 108, 111 (1942), *cited in Marwil* v. *Board of Regents, et al.*, Civil Action No. 79-73331 (E.D. Mich., July 3, 1980).

Apart from its constitutional origins, the University has another claim to being the "alter ego" of the state: it is fiscally tied to it. The Michigan Supreme Court has stated: "The property held by the Regents in their corporate capacity is the public property of the State held by the corporation in trust for the purposes to which it was devoted." *Auditor General* v. *Regents*, 83 Mich. 467, 469-470 (1890); *see also Lucking* v. *People*, 320 Mich. 495 (1948). Therefore, if a judgment diminishes the resources of the University, it immediately diminishes the resources of the state, which has an interest in the property.[5] Furthermore, Art. 8 § 4 of the Michigan Constitution provides, *inter alia*: "The legislature shall appropriate money to maintain the University of Michigan . . . [and] the legislature shall be given an annual accounting of all income and expenditures by [the University]." Thus, the legisla-

---

[5] At least with respect to tort claims, the University is specifically subsumed under the state umbrella. Judgments against the University are to be paid by the state. M.C.L.A. §§ 691.1401, 600.6095.

ture has some responsibility for insuring the continued financial sustenance of the institution.[6]

Because the Board has been recognized as an independent branch of state government by the Michigan courts, and because the state is obligated to see that it has sufficient funds to survive, I hold that it is a state instrumentality within the meaning of the Eleventh Amendment.

## II.

Ewing argues that even if the University is a state instrumentality within the meaning of the Eleventh Amendment, it has waived its sovereign immunity. I do not agree. The standard I am guided by in evaluating Ewing's contention of waiver was stated by the Supreme Court in *Edelman* v. *Jordan, supra*: "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' [Citation omitted]." *Id.* at 673.

---

[6] *M.C.L.A.* 390.8 provides:

The university shall consist of at least 3 departments:

1. A department of literature, science and the arts;
2. A department of law;
3. A department of medicine; [and]
4. Such other departments . . . as the regents shall deem necessary, and the state of the university fund shall allow.

Although the level of state appropriations for the University is not set by any constitutional provision or statute, M.C.L.A. § 390.8 read against the background of Art. 8 § 4 of the Michigan Constitution is a starting point for determining the minimum funding obligation of the state. While certain departments of the University exist within the discretion of the Board and subject to fluctuating funding, the three departments mentioned in § 390.8 are to be preserved. If private support is lacking, it follows that the state must take up the slack to "maintain" the University.



Since *Edelman*, the Sixth Circuit has considered the question of whether Eleventh Amendment immunity has been waived by a state university sued under § 1983. In *Soni* v. *Board of Trustees of the University of Tennessee, supra,* the court held a statutory provision providing that the University of Tennessee could sue and be sued "in any court of law or equity" was a waiver of governmental immunity. Ewing would have me hold that an analogous clause which covers the University of Michigan and provides: "The board of regents shall constitute the body corporate, with the right as such of suing and being sued, of making and using a common seal, and altering the same." (§ 390.4) should be similarly construed. This interpretation is belied by two later Sixth Circuit cases. The "sue and be sued" clause at issue in *Martin* v. *University of Louisville*, 541 F.2d 1171 (6th Cir. 1976), provided that the university had the power to "sue and be sued, complain and defend, in its corporate name." *Id.* at 1174, *citing* Kentucky Revised Statutes, Section 273.172(2). Distinguishing *Soni* v. *Board of Trustees, supra,* the court held in *Martin* that a state's consent to suit in its own courts "does not necessarily imply its consent to suit in federal court." *Id.* at 1175. Unlike the "sue and be sued" statute in *Soni*, the statute in *Martin* did not provide for suit in "any court of law or equity"; therefore, no waiver of immunity in the federal courts was found. *See also Long* v. *Richardson*, 525 F.2d 74 (6th Cir. 1975). M.C.L.A. § 390.4 also lacks language providing for suit "in any court of law of equity." I cannot, therefore, find in M.C.L.A. § 390.4 the type of clearly expressed waiver of immunity in the federal courts that the Supreme Court and the Sixth Circuit have indicated must be present before waiver is established.

Ewing offers other arguments to support his position that the University has waived Eleventh Amendment immunity, but I find them similarly unconvincing. Ewing suggests that M.C.L.A. § 600.6440, part of Michigan's Court of Claims Act, must be read to establish waiver in the federal courts. Under

M.C.L.A. § 600.6419, the Court of Claims is established in Michigan as having exclusive jurisdiction over all claims against the state which are not excepted by § 600.6440. Section 600.6440 provides: *"No claimant may be permitted to file claim* in said court against the state nor any department, commission, board, institution, arm or agency thereof *who has an adequate remedy upon his claim in the federal courts . . . ."* (Emphasis added).

Admitting the possibility that some causes of action might appropriately be brought in federal court against the state is not the same as a general waiver of immunity from suit in the federal courts. As Judge Pratt observed in *Marwil* v. *Board of Regents, supra,* "The Michigan legislature merely determined that *where appropriate,* an exhaustion of federal court remedies would be required." *Id.* at 10. It is completely consistent with the Act to acknowledge a distinction between types of federal suit for which the state has waived immunity, and those for which it has not. The statute dictates an order of procedure *only* with respect to those cases for which federal amenability to suit has already been established.[7] *See also Copper S.S. Co.* v. *State of Michigan,* 194 F.2d 465 (6th Cir. 1952). Where no independent source of immunity is present, the plaintiff will not be allowed to bootstrap a waiver because of the Court of Claims Act.

Ewing's argument that the University's purchase of liability insurance is waiver of immunity is also unavailing. Merely purchasing such insurance does not constitute the type of knowing and clearly expressed waiver necessary to eliminate Eleventh Amendment immunity. *Branum* v. *Board of Regents*

[7] For example, suits brought against a state for attorney fees or back pay under Title VII of the Civil Rights Act of 1964 are properly cognizable in federal court. *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1976). Congress, acting pursuant to its Fourteenth Amendment § 5 enforcement power, has "overriden" the states' Eleventh Amendment immunity in such cases. It has not done so with respect to § 1983 suits. *Quern* v. *Jordan,* 440 U.S. 332 (1979).



*of University of Michigan,* 5 Mich.App. 134, 137 (1966). Furthermore, M.C.L.A. § 691.1409 specifically provides: ". . . The existence of any policy of insurance indemnifying any governmental agency against liability for damage is not a waiver of any defense otherwise available to the governmental agency in defense of the claim."

Finally, Ewing's insistence that there may be facts which indicate a waiver in this particular case does not impress me. Ewing has alleged no such facts. I recognize that a waiver may occur by conduct of the parties, as the Supreme Court implicitly found in *Toll, President, University of Maryland* v. *Moreno,* 50 U.S.L.W. 4880 (June 28, 1982), but this theoretical possibility does not deter my granting defendant's motion under the circumstances of this case.

## III.

Because I have held that the University is a state instrumentality entitled to Eleventh Amendment immunity which it has not waived, I need not reach the question of whether it is a "person" for purposes of 42 U.S.C. § 1983. Whether or not it is a "person," the University is immune from money damages.

An order consistent with this opinion is entered herewith.

/s/ JOHN FEIKENS
Chief United States District Judge

Dated: December 15, 1982.

## APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 82-60271

SCOTT E. EWING,

Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendant.

## OPINION

[Entered March 22, 1983, and reported at 559 F. Supp. 791 (E. D. Mich. 1983)]

### I.

Plaintiff, Scott E. Ewing (Ewing), was admitted as a student to the Inteflex program at the University of Michigan in the fall semester 1975; his purpose — to become a medical doctor. This six (6) year program is governed by a University Policy Committee with the Literature, Science and Arts College responsible for the curriculum awarding the B.A. (B.S.) degree and the Medical School responsible for the curriculum awarding the M.D. degree (Defendant's Exhibit 1).

The program is planned to educate individuals whose academic ability, based on high school grades and test scores, is on the same level as those who qualify for admission to the Medical School. The program runs on a ten-month academic



year for the first four years. The first year preceptorship is usually over by the middle of June, but in the subsequent two years, spring half-term classes meet until the end of June. The fourth year classroom courses end in early May, allowing students to prepare for Part I of the National Board of Medical Examiners (NBME) given in mid-June. A three-week basic clerkship begins in early July, after which the Inteflex student enters the Medical School's clinical phase which ends in the spring of the sixth year with the award of the M.D. degree (Defendant's Exhibit 1, page 4).

In this case, Ewing seeks an order compelling the defendants to permit him to retake Part I of the NBME. He does so because after he failed that examination, he was dismissed from the Inteflex program.

### A.

In the fall of 1975, when Ewing enrolled in the program, he encountered immediate difficulty in handling the work and he did not take the final examination in Biology. It was not until the following semester that he completed this course and received a C. His performance in his other first semester courses was as follows: a C in Chemistry 120, a C in his writing course, and an incomplete in the Freshman Seminar. In the next semester he took Chemistry 220, a Freshman Seminar, and Psychology 504. He received a B in the Freshman Seminar, a C in Chemistry 220, but he withdrew from Psychology 504. He was advised at that time that he could not take the Patient Care course, usually given during the fall of an Inteflex student's second year, and he was placed on an irregular program. Because of these difficulties, at the July 14, 1976 meeting of the Promotion and Review Board he requested a leave of absence, and when this was approved, he left the program.

During the summer of 1976 while on leave, he took two Physics courses at Point Loma College in California. He reentered the Inteflex program at the University of Michigan in

the winter 1977 term. In that term he repeated Chemistry 220 in which he received an A–. In the spring of 1977, he passed the Introduction to the Patient Care course.

In the 1977-78 year, he completed the regular Year II program. But then he encountered new difficulty. In the fall of 1978 he received an incomplete in Clinical Studies 400, which was converted to a Pass; a B in Microbiology 420; and an incomplete in Gross Anatomy 507. The Gross Anatomy incomplete was converted to a C– by a make-up examination. During the winter of 1979 he received a C– in Genetics 505, a C in Microbiology 520, an E in Microanatomy and General Pathology 506, a B in Creative Writing, and a Pass in Clinical Studies 410. He appealed the Microanatomy and General Pathology grade, requesting a change from an E to a D, and a make-up exam to receive a Pass. His appeal was denied by the Grade Appeal Committee, and he was again placed on an irregular program; he took only the Clinical Studies 420 course in the spring 1979 semester.

In July 1979, Ewing submitted a request to the Promotion and Review Board for an irregular program consisting of a course in Pharmacology in the fall and winter 1979-80 and a course in Human Illness and Neuroscience in 1980-81, thus splitting the fourth year into two years. The Board denied this request and directed him to take the fourth year curriculum in one academic year. He undertook to do so. He removed his deficiency in Microanatomy and General Pathology 506 by repeating the course during the winter 1980 semester and received a C+. In the spring term of 1980 he passed Developmental Anatomy with a B– grade, and he received a C grade in Neuroscience I 509 after a reexamination. In the fall of 1980, he received a passing grade in Neuroscience 609 and Pharmacology 626, and in the winter term of 1981, he received a passing grade in Clinical Studies 510 and a deficiency in Pharmacology 627. He was given a make-up examination in this course, and he received a 67.7 grade.



He then took Part I of the NBME (National Board of Medical Examiners) examination. The NBME examination is administered by the Board of Medical Examiners, a proprietary organization which devises tests for licensure. Part I of the NBME examination must be passed before a student in the Medical School can reach the clinical stage of the program. Both regular medical students (known also as standard students) and students in the Inteflex program are required to take Part I of the NBME examination before continuing with clinical studies. Ewing received a score of 235; a score of 345 was required for a passing grade. His 235 score was not only the lowest score in his class, but the lowest score ever recorded by a University of Michigan student in the Part I examination. Because of this, on July 24, 1981, the Promotion and Review Board voted unanimously to drop him from registration in the program, noting that he had been earlier advised that any future deficiency would lead to dismissal.

On August 27, 1981, Ewing appealed the decision of the Promotion and Review Board to the Executive Committee. That Committee, having reviewed the record and having discussed the issues with Ewing and his representatives, Drs. Anderson and Shott, again unanimously affirmed the action of the Promotion and Review Board. It did so by approving a motion to deny Ewing's appeal for a request for a leave of absence status so that he could retake Part I of the NBME examination.

**B.**

The evidence indicates that since this NBME board program was instituted, thirty-two standard students in the Medical School who failed Part I of the NBME were permitted to retake the test. Of these thirty-two students, ten were allowed to take the test a third time, and one a fourth time. It also appears that seven students in the Inteflex program were allowed to retake the test, and one student was allowed to retake

it twice. Ewing is the only student who, having failed the test, was not permitted to retake it.

Dr. Robert E. Reed, a former Director of the Inteflex program, and a member of the Promotion and Review Board, stated that students were routinely given a second chance absent other circumstances. It is because of this claimed disparity between Ewing and other students that Ewing argues that the decision of the defendants is arbitrary and capricious, and thus a violation of his substantive due process rights.

## C.

Ewing was born in 1956. He graduated from high school in British Columbia in 1974 and, before entering the Inteflex program in the fall of 1975, he traveled somewhat and was also gainfully employed. In his application to the Inteflex program, he wrote:

> I should be considered because of my personal and academic accomplishments which I feel demonstrate my suitability to the study of medicine. . . . The academic aspects of medicine are particularly appealing to me. I decided to apply to your integrated pre-medical-medical program because of its unique emphasis on communication skills and the social problems of health care.

Yet, on March 8, 1976, his file reveals that Dr. Reed wrote to the Inteflex counseling staff, saying:

> [Ewing's] record this past fall was deficient enough that he initially came to the attention of the Literary School's Administrative Board, although they accepted his appeal and allowed him to register for the winter term.

Later in 1976, Ewing was advised of the Interim Board's concern with his poor performance. A note in his record on May 7, 1976 states:

> The way he has been behaving is viewed as much more alarming than the student is willing to admit to.



Because of this, he was given a leave of absence for the ensuing year. In a letter to the Board concerning this, he writes about the possibility of going to another school that "might be just the thing to rescue me from the throes of academic lethargy."

## D.

Earlier I commented on Ewing's academic difficulties. It is significant that it took him three years to complete the first two years of the program. It is also apparent that he had great difficulty in the "hard" science courses. It was directly as a result of having received an E in Microanatomy and General Pathology that he was placed on academic probation. He countered this with a request that he be put on an irregular program so as to lighten the load, and it is noteworthy that the Promotion and Review Board at this stage advised him that he could no longer cope by doing reduced work.

On July 30, 1980, Dr. Reed advised Ewing that because of his poor performance in Neuroscience 509, he had to take a reexamination. Dr. Reed wrote:

> The Board was concerned that this may be an indication that the problems that previously led to your irregular schedule and difficulty in completing course work might be returning. The Board wishes to note these concerns to you and to remind you that any further deficiencies in the Program would be grounds for dismissal from registration.

In the winter of 1981, he received a Deficiency in Pharmacology, indicating that he was still having difficulty mastering his work. By the end of the winter 1981 semester, he had been in the Inteflex program six years, and he had only completed Phase I and Phase II (four years of the program).

Ewing's discussion of his problems with the Promotion and Review Board on July 31, 1981 is also significant. The minutes note that Ewing reviewed the events of the previous year.

He noted that his mother's heart attack in the spring of 1980 had been a disrupting influence during the summer and early fall but that in spite of that he had performed satisfactorily throughout the fall term in what he described as the most difficult term in the curriculum. However, early in the winter term a 5½ year close relationship with his girl friend ended. Scott described this as having a greater negative effect on him than it should have primarily due to the length and closeness of the relationship and the fact that he had changed classes twice and therefore did not have the close relationship with classmates that other Inteflex students had who stayed with their classes.

He also noted that he had spent a great deal of time preparing a paper for the Hopwood Essay contest. He circulated this 100-page paper among the Board members for review. Mr. Ewing stated that in retrospect he should not have devoted this much time to his writing but that he felt a commitment to his instructor who had encouraged his work. Scott said that the work on the paper and his personal crisis had caused him to get behind in his work in Human Illness and Pharmacology and that he was only beginning to recover by the end of the year. He cited his passing scores on the last examinations in Human Illness and Pharmacology as evidence that his performance was improving. He stated that the requirement for a make-up examination in Pharmacology was a great shock to him and that he was under a great deal of pressure because of the previous Board stipulations regarding further deficiencies. After successfully completing the Pharmacology make-up examination he only had ten days to prepare for the Boards. His background, the fact that he was further away from the basic medical science courses than other Inteflex students and the pressure to achieve made it very difficult for him to achieve a passing score. While taking the exam he realized that while the terminology was familiar to him, he was not prepared to pass it and a certain amount of "panic" set



in which he believes made his score even lower than it would have been without this pressure.

Mr. Ewing reminded the Board of the time and effort he had already invested in the Program and his deep desire for a career in medicine. He cited the excellent clinical work that he has done circulating a patient work-up he had prepared in the Clinical Studies 400 course which had been described as excellent by Dr. Faith Fitzgerald and a recent paper prepared during his clerkship. These plus his honors grade in the Introductory Clerkship, Mr. Ewing said, was evidence of the level of clinical work of which he was capable. He asked for a second chance at the National Board test with adequate time to prepare.

Several of the Board members then asked Mr. Ewing questions. Dr. Murphy noted that a number of students in the Program have had very severe personal crisis in their personal lives which had not affected their work to the degree that had Scott's and wondered why this had had such an impact on him. Mr. Ewing replied that the long-term nature of the relationship and the fact that he had changed classes twice in the Program made his situation somewhat unique. Dr. Gershowitz noted that there were numerous instances in Mr. Ewing's record of having incompletes and make-up examinations to achieve a passing grade. He expressed concern that this pattern seemed to be continuing up to the present. Mr. Ewing agreed that this had been a pattern and he explained that it might be due to a lack of maturity, but stressed the fact that he had learned a great deal during this past year about himself and felt that the previous tendency to put things off and not be well prepared was now past him.

*Dr. Friedman asked if Mr. Ewing had been aware of the meaning of the letters that he had received which advised him that further deficiencies would lead to his being dropped from the Program or would be grounds for dismissal from the Program. Mr. Ewing said he was well aware of what those meant and in fact this had led to his being "under the gun" during his last two years in the*

*Program. He reiterated that this may have been one factor in his low performance on the National Board examination because he realized the critical importance of passing.* (emphasis added).

There being no further questions, Mr. Ewing summarized his situation by reviewing the particular reasons for his poor performance during the past term, the evidence from his work of his ability to perform at the clinical level and his strong desire to continue toward a career in medicine.

Even after Ewing had been dropped from the program, the faculty offered to permit him to make a "shelf examination." This is an examination in which the faculty administers Part I of the NBME examination and the results can be used to make an application to another medical school; the results *cannot* be used for readmission to the University's Inteflex program. Ewing did not take this "shelf exam."

## II.

Ewing claims a violation of his substantive due process rights. In an amended complaint he claims that he is denied a protectible property interest in not being able to retake Part I of the NBME test and that this action on the part of defendants is arbitrary and capricious, primarily because while other students were allowed to retake the examination, he was not permitted to do so. He claims also that this decision is contrary to medical school accepted practice. He asks that he be reinstated as a student in good standing in the Inteflex program if, being permitted to take a reexamination of the Part I NBME test, he achieves a passing score. In Count II he alleges a contractual relationship with the University which he claims is materially breached in that he was dismissed after a single failure of the NBME Part I examination. In Count IV he sets up a claim of promissory estoppel. Count III has heretofore been dismissed by me since it seeks damages against the State contrary to the prohibitions of the Eleventh Amendment.



## III.

The basic issue is whether and to what extent academic decisions as to the qualifications of a medical student are subject to substantive due process review in this court.

The starting point of this inquiry is the United States Supreme Court's decision in *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978), in which the plurality opinion states:

> [In regard to substantive review] a number of lower courts have implied in dictum that academic dismissals from state institutions can be enjoined if "shown to be clearly arbitrary or capricious." *Mahavongsanan* v. *Hall*, 529 F.2d at 449. *See Gaspar* v. *Bruton*, 513 F.2d at 850, and citations therein. Even assuming that the courts can review under such a standard an academic decision of a public educational institution, we agree with the District Court that no showing of arbitrariness or capriciousness has been made in this case [footnote omitted]. Courts are particularly ill-equipped to evaluate academic performance. The factors discussed [above] with respect to procedural due process speak *a fortiori* here and warn against any such judicial intrusion into academic decisionmaking [footnote omitted].

*Id.* at 91-92.

*Horowitz* did not directly settle the question whether courts can review academic qualification decisions on substantive due process grounds. Some lower courts have dealt with this uncertainty by finding on the facts that, even if such review is permitted, the claim of arbitrary or capricious action on the part of a medical faculty was not proven. For example, in *Stevens* v. *Hunt*, 646 F.2d 1168 (6th Cir. 1981), the United States Court of Appeals for the Sixth Circuit was required to decide whether the dismissal of a number of students from medical school was arbitrary or capricious, and stated:

> The *Horowitz* decision still leaves open the question

as to whether such a cause of action exists. Even if a cause of action does exist, it is clear, however, that arbitrary and capricious action on the part of the University officials would be a necessary element in order for plaintiffs to prevail. *Board of Curators* v. *Horowitz*, 435 U.S. 78, 91, 98 S.Ct. 948, 955, 55 L.Ed.2d 124 (1978).

> In order to establish such arbitrary and capricious action, the plaintiffs must show that there is no rational basis for the University's decision, *Greenhill* v. *Bailey*, 519 F.2d 5; *Horowitz* v. *Board of Curators*, 447 F.Supp. 1102 (D.C.Mo. 1975) or that the decision to dismiss was motivated by bad faith or ill will unrelated to academic performance. *Garpar* v. *Burton*, 513 F.2d 843.

*Id.* at 1170. The Court went on to hold that "[I]t cannot say that the dismissals were arbitrary and capricious. Therefore, the decision of the district court is affirmed." *Id.* The United States Court of Appeals for the Eighth Circuit disposed of a similar claim in identical fashion in *Hines* v. *Rinker*, 667 F.2d 699 (8th Cir. 1981).

Other post-*Horowitz* decisions have either tacitly or expressly concluded that *Horowitz* does allow such substantive review. *Dietz* v. *Amerian Dental Ass'n*, 479 F.Supp. 554 (E.D.Mi. 1979); *Aubuchon* v. *Olsen*, 467 F. Supp. 568 (E.D. Mo. 1979); *Watson* v. *University of South Alabama College of Medicine*, 463 F.Supp. 720 (S.D.Ala. 1979); *Bleicker* v. *Board of Trustees of the Ohio State University, College of Veterinary Medicine*, 485 F.Supp. 1381 (S.D.Oh. 1980). A recent Fifth Circuit decision not only allowed such review, but found that the academic decision in question was arbitrary and capricious in that it required students to be tested on materials which they had not been adequately taught. *Debra P.* v. *Turlington*, 644 F.2d 397 (5th Cir. 1981).[1]

---

[1] *Debra P.* is not directly analagous to either *Horowitz* or this case in that it concerned academic decisions made by the state legislature and applied to high school students.



In determining the proper scope of substantive review of decisions involving academic qualification, I must consider the traditional relationship between courts and schools. In this relationship courts have usually adopted a "hands-off" posture. In commenting on the relationship between courts and medical schools, *Connelly* v. *University of Vermont*, 244 F. Supp. 156 (D.Vt. 1965), states:

> [I]n matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student, and efficiency of instruction depends in no small degree upon the school faculty's freedom from interference from other noneducational tribunals.
>
> . . . .
>
> A medical school must be the judge of the qualifications of its students to be granted a degree; Courts are not supposed to be learned in medicine and are not qualified to pass opinion as to the attainments of a student in medicine.

*Id.* at 160-161. Similarly, the court in *Keys* v. *Sawyer*, 353 F.Supp. 936 (S.D.Tex. 1973), states:

> University officials should have broad discretionary power to determine the fitness of a student to continue his studies. There is a compelling need and very strong policy consideration in favor of giving local school officials the widest possible latitude in the management of school affairs.

*Id.* at 940.

*Horowitz* demonstrates the continuing vitality of this hands-off approach in warning against judicial intrusions into such areas. 435 U.S. at 92. Additionally, Justice Powell's concurrence in *Horowitz* recognized that:

> University faculties must have the widest range of discretion in making judgments as to the academic per-

> formance of students and their entitlement to promotion or graduation.

435 U.S. at 96. n.6.

This is not to say that decisions as to academic qualification are not subject to substantive due process review. Throughout this century this constitutional requirement has constantly been interpreted as requiring both procedural and substantive compliance. *Kelley* v. *Johnson*, 425 U.S. 238 (1976). So long as protected interests (life, liberty or property) are implicated, the Constitution mandates that due process, including all of its component parts, be accorded.

Traditional substantive due process review requires a court to scrutinize an action which may result in the deprivation of a protected right and strike it down if it is found to be arbitrary or capricious. This requirement is not so rigid, however, as to mandate the same scope and depth of review in every situation. Due process has proved to be an extremely flexible concept when applied to educational decisionmaking. In its common application, procedural due process normally requires notice and a hearing prior to the deprivation of a protected interest. In school disciplinary actions, the Supreme Court has held that all that it required is an informal "give and take" in which the student is provided with notice along with some opportunity to present his or her side of the story. *Goss* v. *Lopez*, 419 U.S. 565 (1975). Moreover, in the case of dismissals because of a lack of academic qualification, the Supreme Court has held that procedural due process may require nothing more than prior notice. *Horowitz, supra.*

This same flexibility applies *a fortiori* to substantive due process areas. *Horowitz* clearly expresses the view that traditional substantive due process review is inappropriate in academic qualification decisions, saying that courts are ". . . particularly ill-equipped to evaluate academic performance." 435 U.S. at 92.

Thus I conclude that the substantive due process review applicable to cases involving academic qualification decisions



only allows me to scrutinize the objective factors which may have tainted or otherwise affected the decision, and not the propriety of the decision itself. Having concluded this, I could appropriately review whether such a decision was "motivated by bad faith or ill will unrelated to academic performance." *Stevens*, 646 F.2d at 1170. Likewise, I could also review whether the decision was based on arbitrary or capricious factors which are not reasonably considered to be academic criteria. But, I am not permitted to review the ultimate academic qualification decision which has been made in a "careful and deliberate" manner, *Horowitz*, 435 U.S. at 85, and not influenced by ill will or ulterior purposes. Put another way, if all that went into the academic qualification decision complied with substantive due process, this would constitute per se proof that the decision reached is in accord with substantive due process. I thus will not and cannot examine, in any manner, the decision itself.

Such a rule is supported by *Horowitz's* admonition and warning against the use of traditional substantive due process review. This rule is also supported by direct precedent. In *Gaspar* v. *Burton*, 513 F.2d 843 (10th Cir. 1975), the court stated:

> The courts are not equipped to review academic records based upon academic standards within the particular knowledge, experience and expertise of academicians. Thus, when presented with a challenge that the school authorities suspended or dismissed a student for failure re academic standards, the court may grant relief, as a practical matter, only in those cases where the student presents positive evidence of ill will or bad motive.

*Id.* at 851.

This type of limited review represents the only practical and workable judicial approach to academic qualification decisionmaking. While courts may be loath to step in and regrade an essay exam or evaluate the merit of a curriculum, such a re-

view, however ill-advised, could be accomplished. But in certain areas, such as the evaluation of the clinical performance of a medical student, courts are completely unable to afford review in that the evidence of the performance, the student's actual functioning in a clinical experience, can no longer be directly observed and evaluated. Thus, it is for prudential as well as pragmatic reasons that the propriety of academic decisions cannot be reviewed.

Such limited review will protect the interests of educators as well as those of students. It will afford colleges, school boards, and teachers the traditional broad range of autonomy which they need in order to tend to the business of education. At the same time it will protect the student from actions which are tainted by any arbitrary and capricious non-academic considerations.

Accordingly, I find that defendants did not act in violation of Ewing's due process rights. There have been no allegations offered to the effect that defendants' decision was based on bad faith, ill will or other impermissible ulterior motives. The evidence demonstrates that the decision to dismiss plaintiff was reached in a fair and impartial manner, and only after careful and deliberate consideration.

To leave no conjecture as to my decision, even under a traditional substantive due process review, I find that the evidence demonstrates no arbitrary or capricious action since the defendants had good reason to dismiss Ewing from the program.

I also reject the contract and promissory estoppel claims, finding no sufficient evidence to conclude that the defendants bound themselves either expressly or by a course of conduct to give Ewing a second chance to take Part I of the NBME examination. Ewing contends that the pamphlet "On Becoming A Doctor," which states that a qualified student would be given a second chance to take the NBME, gives him a contractual right to do so. Even if he had learned of the pamphlet's contents before he took the examination, and I find



that he did not, I would not conclude that this amounted either to an unqualified promise to him or gave him a contract right to retake the examination.

Accordingly, I find in favor of the defendants and against the plaintiff on all counts. An appropriate order may be entered.

/s/ JOHN FEIKENS
Chief United States District Judge

Dated: March 22, 1983

## APPENDIX D

---

No. 83-1333

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

SCOTT E. EWING,

*Plaintiff-Appellant.*

v.

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

*Defendant-Appellee.*

---

**On Appeal from the United States District Court for the Eastern District of Michigan.**

---

Decided and Filed September 6, 1984.
[Reported at 742 F.2d 913 (6th Cir. 1984)]

---

Before: KEITH, Circuit Judge; PECK, Senior Circuit Judge; and NEESE, Senior District Judge.*

KEITH, Circuit Judge. This is an appeal by the plaintiff, Scott E. Ewing, from a reported decision of the United States District Court for the Eastern District of Michigan finding in favor of the defendant, the Board of Regents of the Uni-

---

* Honorable C. G. Neese, Senior Judge, United States District Court for the Eastern District of Tennessee, sitting by designation.



versity of Michigan, 559 F. Supp. 791 (E.D. Mich. 1983). In the district court the plaintiff had sought an order to compel the defendant to allow him to retake the National Board of Medical Examiners' Part I Examination. For the reasons stated below, the decision of the district court is reversed and remanded with instructions that an appropriate order be entered consistent with this opinion.

In 1981, Ewing was enrolled as a student in the University of Michigan's six-year program of combined undergraduate and medical education, known as the Inteflex Program. Ewing sat for and failed the National Board of Medical Examiners' Part I Examination (NBME Part I) in June 1981. Because of his failure of the NBME Part I, Ewing was dismissed from the Inteflex Program. Ewing prosecuted two administrative appeals of the decision to dismiss him. Both appeals were denied as the Inteflex Phase II Promotions and Review Board and the Executive Committee of the Medical School determined to affirm the decision to terminate his registration.

Ewing filed suit in the United States District Court for the Eastern District of Michigan, seeking an injunction that would require the Board to permit him to take the NBME Part I again and, if he passed, to reinstate him with the same status as if he had passed on the first occasion. Ewing's amended complaint asserted claims based upon: (1) the violation under color of state law of his substantive due process rights, which is actionable under 42 U.S.C. § 1983 (Count I); (2) breach of contract (Count II) and (3) the principles of promissory estoppel (Count IV).[1] A nonjury trial of Counts I, II and IV was held in the district court in Ann Arbor, Michigan, with the Honorable Chief Judge John Feikens presiding, on

---

[1] Count III seeking monetary damages pursuant to 42 U.S.C. § 1983 was dismissed by the district court, prior to trial, based upon immunity conveyed to the Board under the 11th amendment to the United States Constitution. 552 F.Supp. 881 (E.D. Mich. 1982). Ewing did not appeal the dismissal of his claim for monetary damages.

January 10-12 and 14, 1983. The district court filed an opinion on March 22, 1983, denying each of Ewing's claims and directing that an appropriate order be submitted. 559 F. Supp. 791 (E.D. Mich. 1983). Based upon that opinion, the district court entered judgment in favor of the Board on April 11, 1983, and this appeal followed.[2]

It is well settled that in order to prevail in a Section 1983 action, the plaintiff has the burden of showing that he was deprived of a constitutional right and that the deprivation occurred under color of state law. *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 155-56 (1978). It is not disputed that the defendants were acting under color of state law. *Ewing* v. *Board of Regents of the University of Michigan*, 552 F. Supp. 881, 883 (E.D. Mich. 1982). The issue then, with respect to the Section 1983 claim, is whether Ewing was deprived of a constitutionally cognizable right.

The United States Supreme Court has held that property interests, which may give rise to constitutional protections, are created and defined by existing rules or understandings which stem from independent sources, such as state law. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577 (1972). The Court has also held that these property interests can arise from explicit contractual provisions or "other agreements implied from the promissor's words or conduct in light of the surrounding circumstances." *Perry* v. *Sindermann*, 408 U.S. 593, 601-02 (1972).

In an old racial discrimination case, *Booker* v. *Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589 (1909), the Michigan Supreme Court discussed the contractual aspects of the relationship between a medical student and his institution. Although, the explicit holding of *Booker* has

---

[2] Because we believe this case can be disposed of on the Section 1983 claim, this Court does not expressly reach the breach of contract or promissory estoppel claims.



since been discredited, the view of the Michigan High Court on the contractual relationship issue is instructive:

> In fact, when one is admitted to a college, there is an implied understanding that he shall not be arbitrarily dismissed therefrom. The required fees may be paid annually, and may be no more than fair fees for the advantages received by the student during the year, and yet it is clear that the fees for the first year are, in fact, paid and received with the understanding that the work of the year will not be made fruitless, a graduation and a degree made impossible, by an arbitrary refusal to permit further attendance. . . . There is no good reason why the law should not recognize, as growing out of these relations, a right of realtors resting in contract to be continued as students by the respondent.

156 Mich. at 99-100.

Other circuit courts have also agreed in the contractual nature of the relationship between a student and his university. *See, e.g., Corso* v. *Creighton University*, 731 F.2d 529, 531 (8th Cir. 1984); *Williams* v. *Howard University*, 528 F.2d 658, 660 (D.C. Cir.), *cert. denied*, 429 U.S. 850 (1976). Thus, we hold that an implied understanding that a student shall not be arbitrarily dismissed from his university is a property interest, resting in the contractual relationship between the parties, which can give rise to constitutional protections.

In *Stevens* v. *Hunt*, 646 F.2d 1168 (6th Cir. 1981), this Court discussed the possibility that a university student may have a cause of action for the violation of substantive due process rights arising out of an academic dismissal from a university. In *Stevens*, this Court referred to the United States Supreme Court's decision in *Board of Curators* v. *Horowitz*, 435 U.S. 78 (1978), and said:

> The *Horowitz* decision still leaves open the question as to whether such a cause of action exists. Even if a cause of action does exist, it is clear, however, that arbitrary

> and capricious action on the part of the University officials would be a necessary element in order for plaintiffs to prevail.
>
> In order to establish such arbitrary and capricious action, the plaintiffs must show that there is no rational basis for the University's decision, or that the decision to dismiss was motivated by bad faith or ill will unrelated to academic performance.

646 F.2d at 1170 (citations omitted). Pursuant to the guidance provided by *Stevens*, we hold that the arbitrary and capricious deprivation of a constitutionally cognizable right does state a valid case of action.

In the case at bar, the University of Michigan argues, in essence, that even if there were a contractual relationship between the parties, their action in dismissing Ewing is not arbitrary and capricious because the terms of any such contract would be defined solely by the University of Michigan Medical School Bulletin. This bulletin notes the broad discretionary power of the Promotion and Review Board. *See* Appellee's Brief at 25-27 (quoting from the University of Michigan Medical School Bulletin, 1975-77 ed. at 34; 1977-79 ed. at 36). This limited view of the terms of the contractual relationship between the parties ignores, however, substantial and uncontroverted evidence in the trial record that at the time Ewing took the NBME Part I, medical students were routinely given a second opportunity to pass it. Joint Appendix at 157-58. In fact, the evidence is undisputed that between 1975 and 1982, of the forty medical students who failed the NBME Part I on the first attempt, every one of these students was allowed a reexamination except Ewing. Joint Appendix at 110-11.

In light of this undisputed evidence of a consistent pattern of conduct, the finding of the district court that there was not "sufficient evidence to conclude that the defendants bound themselves either expressly or by a course of conduct



to give Ewing a second chance to take Part I of the NBME examination," 559 F. Supp. at 800, is clearly erroneous. A University promotional pamphlet entitled "On Becoming a Doctor", stated that a qualified student would be given a second chance to take the NBME. This University publication is important because, irrespective of whether Ewing saw this pamphlet before taking the NBME Part I, this pamphlet memorialized the consistent practice of the medical school with respect to students who initially fail that examination.

There is substantial evidence in the record, and there is no district court finding to the contrary, that Ewing was a "qualified" student, as the University defined that term, at the time he sat for the NBME Part I. Joint Appendix at 298, 299. The evidence plainly demonstrates that the University treated Ewing in an arbitrary and capricious manner by not allowing him a second opportunity to take Part I of the NBME.

In sum, the evidence demonstrates that it was the consistent practice of the University of Michigan to allow a qualified medical student who initially failed the NBME Part I an opportunity for a retest. The evidence demonstrates that at the time Ewing sat for the NBME Part I he was a qualified student. The evidence also demonstrates that Ewing was the only University of Michigan medical student who initially failed the NBME Part I between 1975 and 1982, and was not allowed an opportunity for a retest. This action by the University of Michigan was arbitrary and capricious and must be reversed.

Accordingly, the decision of the district court is reversed and remanded with instructions that an order be issued compelling the University to allow Ewing to retake the NBME Part I. Further, should Ewing pass the NBME Part I, the district court is instructed to order that Ewing's registration in the Inteflex Program be reinstated.

## APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-1333

[Filed September 6, 1984, John P. Hehman, Clerk]

SCOTT E. EWING,
Plaintiff-Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
Defendant-Appellee.

Before: KEITH, Circuit Judge; PECK, Senior Circuit Judge; and NEESE, Senior District Judge.

### JUDGMENT

ON APPEAL from the United Sates District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed and the case is remanded consistent with this opinion.

It is further ordered that Plaintiff-Appellant recover from Defendant-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN, Clerk

Issued as Mandate: November 8, 1984



## APPENDIX F

83-1333

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed October 31, 1984]

SCOTT E. EWING,
Plaintiff-Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
Defendant-Appellee.

### ORDER DENYING PETITION FOR REHEARING EN BANC

Before: Keith, Peck and Neese

A majority of the Court having not favored rehearing en banc, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, the Court concludes that the petition for rehearing is without merit. Accordingly, it is ORDERED that rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN, Clerk